INDEX

	Page
I. The procedural contentions by which respondents attempt to support the judgment are without merit	1
A. An opinion of value largely based on inadmissible considerations cannot be justified because the facts showing the improper basis of the opinion were elicited on cross-examination	1
B. The presentation by the Government of evidence to rebut the testimony to which its objections had been overruled and its motions to strike denied did not waive such objections	5
C. The Government's motions to strike the opinions were not defective in form	9
D. The fact that the jury viewed the land condemned did not justify denial of the Government's motions for directed verdicts	11
II. Respondents' answers to the arguments made by the Government in its opening brief lack merit	14
A. The present value of agricultural land claimed to be adaptable for subdivision purposes may not be arrived at by capitalizing the net income which, in the opinion of witnesses, could be derived from the lands if they were subdivided and leased for dwellings, business places, and truck gardens	14
B. Elements of value due to a landowner's monopoly of undeveloped land should be disregarded in awarding just compensation for the taking of a part thereof	19
C. The judgments include enhancement of value resulting from the project for which the lands were taken	21
Conclusion	23
Appendix A	24
Appendix B	25

CITATIONS

Cases:	
Alabama Power Company v. *Federal Power Commission*, 136 F. 2d 929	8
Assessors of Quincy v. *Boston Con. Gas Co.*, 309 Mass. 60, 34 N. E. 2d 623	19
Central Georgia Power Co. v. *Stone*, 139 Ga. 416, 77 S. E. 565	2, 4, 8, 15
Chatfield v. *Board of Revision of Taxes*, 346 Pa. 159, 29 Atl. 685	15
Chicago, B. & Q. R. Co. v. *North Kansas City Develop. Co.*, 134 F. 2d 143, certiorari denied 319, U. S. 771	18
Egan v. *City of Philadelphia*, 108 Pa. Super. 271, 164 Atl. 813	18

Cases—Continued. Page

Fidelity & Casualty Co. v. *Griner*, 44 F. 2d 706 4
Fidelity & Deposit Co. of Maryland v. *Bates*, 76 F. 2d 160 .. 7
Forest Preserve District v. *Folta*, 377 Ill. 158 12
Fort Dodge Hotel Co. v. *Bartelt*, 119 F. 2d 253 8
Grand Trunk Pac. Ry. Co. v. *Tollard*, 266 Fed. 676 6
Hamilton v. *Pittsburgh B. & L. E. R. Co.*, 190 Pa. 51, 42 Atl. 369 2
Idaho Farm Development Co. v. *Brackett*, 36 Idaho 748, 213 Pac. 696 18
Laureldale Cemetery Co. v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372 15
Lebanon & Nashville Turnpike Co. v. *Creveling*, 159 Tenn. 147, 17 S. W. 2d 22 18
Lynch v. *Oregon Lumber Co.*, 108 F. 2d 283 8
Maher v. *Commonwealth*, 291 Mass. 343, 197 N. E. 78 ..... 2, 3
McCandless v. *United States*, 298 U. S. 342 ..... 6, 7, 8
Northern Pac. R. Co. v. *North American Tel. Co.*, 230 Fed. 347, certiorari denied, 249 U. S. 607 18
Pierce County v. *Duffy*, 104 Wash. 426, 176 Pac. 670 ..... 2, 10
Re Taxes Bishop Estate, 13 Haw. 671 19
Re Taxes Bishop Estate, 27 Haw. 190 19
Salt Lake City v. *Smith*, 104 Fed. 457 ..... 6, 11
San Diego Land & Town Co. v. *Neale*, 88 Cal. 50, 25 Pac. 977 ..... 2, 15
Sanitary District of Chicago v. *Pittsburgh F. W. & C. R. Co.*, 216 Ill. 575, 75 N. E. 248 19
Somers v. *Meriden*, 119 Conn. 5, 174 Atl. 184 19
Spring Valley Water-Works v. *Drinkhouse*, 92 Cal. 528, 28 Pac. 681 2
State v. *Suffield & Thompsonville Bridge Co.*, 82 Conn. 460, 74 Atl. 775 19
Stockton v. *Ellingwood*, 96 Cal. App. 708, 275 Pac. 238 2
United States v. *Beckstold Co.*, 129 F. 2d 473 10
United States v. *Foster*, 131 F. 2d 2, certiorari denied, 318 U. S. 767 ..... 8, 13
United States v. *Miller*, 317 U. S. 369 ..... 3, 21, 22
United States v. *Reynolds*, 115 F. 2d 294 13
United States v. *River Rouge Co.*, 269 U. S. 411 8
Washburn v. *Milwaukee & L. W. R. Co.*, 59 Wis. 364, 18 N. W. 328 12

Miscellaneous:

118 A. L. R., Note, 893–904 13
2 Nichols Eminent Domain (2d ed. 1917) sec. 445, pp. 1170–1171 11
Orgel, Valuation under Eminent Domain (1936):
sec. 127, pp. 424–429 12
sec. 184, p. 578 18

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 209

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN WATERHOUSE, ERNEST HAY WATERHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

THE PROCEDURAL CONTENTIONS BY WHICH RESPONDENTS ATTEMPT TO SUPPORT THE JUDGMENT ARE WITHOUT MERIT

A. *An opinion of value largely based on inadmissible considerations cannot be justified because the facts showing the improper basis of the opinion were elicited on cross-examination.*—Respondents make repeated reference in their brief to the fact

that the considerations upon which the valuation opinions of their witnesses were founded were brought out by the Government on cross-examination (see Br. 1, 4, 5, 12, 13, 14, 59) and argue that the admission of such evidence is therefore not error (Br. 43–51, 55–56). They assert that "A party who himself elicits testimony cannot object to its admissibility" (Br. 46).

On the contrary, the universal rule in condemnation proceedings is that when cross-examination shows that an expert has based his opinion of value upon an erroneous method of valuation or upon inadmissible considerations, his direct testimony must be stricken.[1] The rule advocated by respondents would result in prohibiting any judicial review of the methods of valuation employed by expert witnesses and even of the standard of value they might apply. This is so because the usual practice is on direct examination simply to qualify the witness as an expert and then inquire as to his opinion of value. The considerations which led him to reach that opinion are rarely developed on

[1] The following cases are illustrative of this rule: *San Diego Land & Town Co.* v. *Neale*, 88 Cal. 50, 62–63, 25 Pac. 977 (1891); *Spring Valley Water-Works* v. *Drinkhouse*, 92 Cal. 528, 28 Pac. 681, 682–683 (1891); *Stockton* v. *Ellingwood*, 96 Cal. App. 708, 716, 275 Pac. 228, 232 (1929); *Maher* v. *Commonwealth*, 291 Mass. 343, 348–349, 197 N. E. 78 (1935); *Pierce County* v. *Duffy*, 104 Wash. 426, 176 Pac. 670 (1918); *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 77 S. E. 565 (1913); *Hamilton* v. *Pittsburgh B. & L. E. R. Co.*, 190 Pa. 51, 42 Atl. 369 (1899).

direct examination but are left for opposing counsel to bring out on cross-examination. Consequently, facts showing that, because a faulty foundation has been used, the opinion is not admissible or that the opinion includes items of value which may not be included in the award almost always appear from cross-examination rather than on direct.

For example, in *Maher* v. *Commonwealth,* 291 Mass. 343, 197 N. E. 78 (1935) an owner on direct examination gave his opinion of value. On cross-examination it appeared that he based this opinion on what real estate experts had told him and upon sentimental considerations. The appellate court reversed because of failure of the trial court to strike this opinion. Acceptance of respondents' contention would permit such an opinion to be considered in determining market value. Similarly, landowners would be permitted to recover enhancement of value due to the Government project, despite this Court's decision in *United States* v. *Miller,* 317 U. S. 369, by the simple expedient of omitting mention of such enhancement during direct examination.

Respondents suggest no reason why such a rule should be adopted. Nor do the decisions cited (Br. 46, 55) tend to support the contention. None of these cases relates to condemnation proceedings nor to any type of proceeding involving valuation of property. In fact, only one case

Fidelity & Casualty Co. v. *Griner*, 44 F. 2d 706 (C. C. A. 9) (Br. 46, 55) concerned an expert witness and, in that case, the medical expert's opinion had been stricken by the trial court on the ground it was based on hearsay evidence and upon evidence not before the jury. Moreover, the Government is not, as respondent suggests (Br. 46), objecting to the answer the witnesses gave to the questions upon cross-examination. It is accepting those answers as true and insisting that they show that the opinions of value given upon direct examination were founded upon improper considerations, and hence should have been excluded from consideration by the jury.

The proper procedure to follow in such circumstances is summarized in *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 77 S. E. 565 (1913) where cross-examination showed that two experts as to value had estimated profits that might be made after improving the property and then based their estimate of market value by prorating the contribution of the landowner to the total result. The court in holding that such evidence should be stricken said (139 Ga. at 420):

> If it were sought to prove such facts for the consideration of the jury, the evidence would be rejected. If a hypothetical question were framed with such facts as a basis for an opinion as to value, the question would be ruled out on objection, because such facts would be illegal and inadmissible.

> So when the witness shows that his opinion is founded on such illegal facts, the opinion is inadmissible.

Respondents do not directly challenge the Government's statement (Br. 27–30) that the mere assertion by the expert that a willing buyer would use the method he employed does not render the evidence admissible. However, the contention that facts appearing on cross-examination must be disregarded in determining admissibility is, in essence, the same contention, for owners do not ordinarily bring out the basis of the expert's valuation on direct examination, and certainly the respondents would deny that the Government might compel such a showing on direct.[18] Both contentions are erroneous for the same reason, i. e., they attempt to make the experts' definition of market value and their notion of the elements that should be considered in determining value conclusive upon the courts.

B. *The presentation by the Government of evidence to rebut the testimony to which its objections had been overruled and its motions to strike denied did not waive such objections.*—Respondents' brief refers many times to the fact that the Government presented evidence concerning the experience of other subdivisions, rates of interest to be used in capitalizing, and similar testimony to rebut

[18] For example, in Hawaii, as in California and some other States, similar sales may not be brought out during direct examination of an expert but may be developed during cross-examination.

respondents' evidence (Br. 3, 17–18, 21, 40, 45, 55–56, 57, 61). They assert (Br. 56): "Error in the admission of evidence offered by one party is cured by the act of the adverse party in offering the same evidence or bringing it out on cross-examination."

The contention is, in effect, that the objecting party, after his view of the law has been rejected by the trial court, must elect whether to insist upon his own theory, withhold his rebuttal evidence and thus waive his opportunity of securing a favorable verdict despite the alleged error or, alternatively, to waive his right to review the ruling by presenting rebuttal evidence in the hope that the jury's conclusion will be favorable. An objecting party is not compelled to make any such election. In *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8), the court discussed this subject at length and concluded (p. 471):

> One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case.

Cf. *McCandless* v. *United States*, 298 U. S. 342, 347; *Grand Trunk Pac. Ry. Co.* v. *Tollard*, 286 Fed. 676 (C. C. A. 8). The cases cited by respondents (Br. 56) have no tendency to show that in the instant case the Government waived the objections which it had repeatedly made, which

had plainly presented the question as to admissibility of respondents' method of valuation, and which had all been overruled. For example, *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F. 2d 160 (C. C. A. 8), held that no prejudicial error was committed in overruling an objection to a third person's testimony of a statement made by an individual to a bank examiner since the bank examiner testified to the same effect.

Similarly, the other cases cited by respondents (Br. 56) did not hold that presentation of rebuttal evidence waived the objection but held that when the fact in question appeared from other evidence the error was not prejudicial. Respondents claim (Br. 54, 57) that no prejudicial error occurred at the trial and cite the harmless error statute, Jud. Code, sec. 269, 28 U. S. C. sec 391. To support the assertion that the verdict was reasonable they refer (Br. 55) to opinion evidence which the Government is here attacking. Thus, the argument is premised on resolving in respondents' favor all the issues presented in the instant case. Moreover, the harmless error statute does not permit the appellate court to substitute itself for the jury and determine that, disregarding evidence erroneously admitted, the result is reasonable. As this Court made clear in *McCandless* v. *United States*, 298 U. S. 342, the vital issue in a condemnation proceeding is the amount of just compensation; hence an erroneous ruling as to valuation evidence

"could not be otherwise than prejudicial," 298 U. S. 342, 348. See also *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Lynch* v. *Oregon Lumber Co.*, 108 F. 2d 283, 285–286 (C. C. A. 9); *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. 2d 252, 259 (C. C. A. 8). This is so even if there are proper opinions of value which exceed the amount of the verdict, for "the jury were not bound to accept the estimates of those other witnesses, and it is impossible to say how far the finding may have been influenced by this improper evidence." *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 421, 77 S. E. 565; see also *United States* v. *Foster*, 131 F. 2d 2 (C. C. A. 8), certiorari denied, 318 U. S. 767. To compel the appellant in condemnation proceedings to prove affirmatively that the particular error produced a different verdict from that which would have been rendered in the absence of such error would place an impossible burden on such appellant, for "what the verdict might have been in a condemnation suit is entirely unpredictable." *Alabama Power Company* v. *Federal Power Commission*, 136 F. 2d 929, 935 (C. C. A. 5). Consequently, as this Court pointed out in the *McCandless* case, 298 U. S. 342, 347–348, an erroneous ruling on a substantial matter, such as the amount of compensation to be paid for a taking, is ground for reversal "unless it *affirmatively* appears from the whole record that it was not prejudicial" [italics by the Court].

There can be no question that the opinions of respondents' witnesses based upon speculative predictions largely influenced the jury and hence that the error was prejudicial. Nor does the Government's rebuttal evidence cure this error nor remove this prejudice. Therefore, the presentation of such rebuttal evidence did not waive the objections.

C. *The Government's motions to strike the opinions were not defective in form.*—Respondents assert that the Government's motions to strike the opinions of the witnesses were properly denied because they referred to all of the witnesses' testimony (Br. 56). Reliance is placed on decisions applying the general rule that when a witness has testified as to various matters relevant to the issues, a trial court does not err in denying a general motion to strike all his testimony when some of it is proper. This is another aspect of the general principle that counsel may not place upon the court the burden of separating the admissible and inadmissible evidence and that counsel must specifically call the court's attention to the ground of objection so that it may intelligently rule thereon.

The Government's motions conformed to this principle and do not violate the rule sought to be invoked by respondents. As in the usual condemnation proceeding, the single issue in the instant

case was the value of the land taken.[2] The testimony was relevant only insofar as it related to that issue. The Government's objection is that the opinions of such value were inadmissible. Hence, there was no substantial part of their testimony which was admissible. Although respondents assert the contrary they fail to specify the testimony which they claim "was clearly admissible" (Br. 56). In rejecting a similar contention, that a general motion to strike expert testimony was insufficient because the testimony as to the expert's qualifications and experience was proper, the court said in *Pierce County* v. *Duffy*, 104 Wash. 426, 176 Pac. 670:

> The inclusion of proper preliminary testimony does not destroy the efficacy of the motion if the testimony as to value alone should yield to such a motion, directed simply to it, for the reason that the preliminary testimony would be immaterial and unavailing for any purpose except as it is associated with and supports the testimony as to market value.

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[2] The only condemnation case cited by respondents (Br. 56, *United States* v. *Becktold Co.*, 129 F. 2d 473 (C. C. A. 8), concerned a general motion to strike testimony of a witness as to value of a plant including land, the building thereon, and machinery in the plant. The failure to specify the particular testimony to which the motion was directed was considered fatal on the ground that his testimony of value of some of the three items concerned was admissible. The motion did not state in what regard the witness' theory of value was erroneous.

Moreover, the Government's motions were not simply motions to strike all of the witnesses' testimony without specifying any reason therefor. In each instance it was clearly stated that the objection was to the speculative basis of the opinion of value (R. 167–168, 194, 197, 219, 262, 314–315). The motion made at the end of the trial stated the Government's contention at length, quoted from 2 Nichols, Eminent Domain (2d ed. 1917), sec. 445, pp. 1170–1171, and concluded (R. 419), "I, therefore, move that the testimony of these witnesses based upon the capitalization of income, which is based upon an alleged subdivision * * * should be stricken from the record." The court was thus fully informed of the testimony to which the Government objected and the reasons for such objections. There could be no misunderstanding of the Government's position. Under these circumstances, it would be absurd to require the Government to annoy the court and delay the trial by reiterating its view which had been rejected and by repeating the substance of the testimony on each occasion when a motion to strike was made. *Cf. Salt Lake City v. Smith*, 104 Fed. 457, 470 (C. C. A. 8).

D. *The fact that the jury viewed the land condemned did not justify denial of the Government's motions for directed verdicts.*—Respondents refer (Br. 57) to the fact that a jury is not bound by the opinion of value of an expert

and also to the fact that the jury viewed the property condemned. This does not mean that the jurors are entitled to disregard the evidence and substitute therefor their personal opinion as to value. This subject was thoroughly analyzed in *Washburn* v. *Milwaukee & L. W. R. Co.*, 59 Wis. 364, 368, 18 N. W. 328, 330, cited by respondents (Br. 57), where the court concluded:

> We think such value and damages could only be assessed upon the evidence given by the witnesses, and that an assessment outside of the evidence could not be upheld. For instance, if no witness had estimated the compensation to which a plaintiff was entitled at less than $500 or more than $1,000, a verdict for less than $500 or more than $1,000 should be set aside because unsupported by evidence.

The decisions of various state courts are in conflict whether the jury should be told that the view is "in the nature of evidence" or that it is made solely to enable the jury "to understand and apply the evidence."[3] Whichever position is taken, the view alone cannot sustain the award. See Orgel, Valuation Under Eminent Domain (1936), sec. 127, pp. 424–429. In *Forest Preserve District* v. *Folta*, 377 Ill. 158, the court stated the function of the view as follows:

> Where the estimates of expert witnesses as to values are conflicting, the jury may re-

[3] The Hawaiian courts have not passed on this subject.

> sort to an inspection of the premises in order to determine the weight of each opinion, but the verdict will not be sustained, unless it is within the range of the values expressed by the witnesses.

In the instant case the only permissible verdict would be for $137,487.00 if values based upon capitalization of prospective earnings after subdivision of the sugarcane land are excluded. All of respondents' witnesses used such a process. The earnings from other subdivisions (R. 276, 332) are irrelevant for the same reason. Similarly, the price of a sale of 3 acres to the City of Honolulu for school purposes (R. 303)[4] and the lease of 2.25 acres to the Bishop Bank (R. 323) tend to show not value of sugarcane lands, but the value of individual lots after subdivision. Thus, unless the Government's contention is rejected, the only verdict which the evidence would justify would be for $137,487.00. The denial of the motion for directed verdicts was proper, therefore, only if value may be measured by reference to the capitalization of

[4] The admission of this evidence over the Government's objection (R. 301–308) was plainly erroneous. The sale was made to the City of Honolulu, a body possessing the power to condemn, for use as a school site. Under such circumstances, the transaction is a compromise to avoid condemnation rather than a voluntary sale; hence the price is not admissible as evidence of value. *United States* v. *Foster*, 131 F. 2d 2 (C. C. A. 8), certiorari denied, 318 U. S. 767; *United States* v. *Reynolds*, 115 F. 2d 294, 296 (C. C. A. 5); Note, 118 A. L. R. 893–904.

expected earnings from the proposed subdivision of the property.

II

RESPONDENTS' ANSWERS TO THE ARGUMENT MADE BY THE GOVERNMENT IN ITS OPENING BRIEF LACK MERIT

A. *The present value of agricultural land claimed to be adaptable for subdivision purposes may not be arrived at by capitalizing the net income which, in the opinion of witnesses, could be derived from the lands if they were subdivided and leased for dwellings, business places, and truck gardens.*—Respondents "do not find it necessary" to controvert this proposition (Br. 30). They agree that evidence of profits which would be realized from a business conducted or a building erected on the land "does not indicate the present value of the land" (Br. 36).

Nevertheless respondents contend that the witnesses' opinions were properly admitted. They refer (Br. 23) to the statement of the court below that "the witnesses were testifying as to value of the land in November 1940" and the discussion of the evidence relates solely to the direct examination during which the witnesses expressed their opinions of market value. (See Br. 25, 29, 30, 41, 43–44.) The cross-examination made it clear that all of the witnesses based their conclusions solely upon the estimated selling price or rental which might be obtained for the individual lots or farms after subdivision. (See Govt.'s Br. 5–6, 15,

17–18.) The opinion of the court below recognized this fact. It described the method of Castro's valuation as follows (R. 459):

> He arrived at that value by capitalizing at 4% the average rentals of $51.57 per acre *which he said could be obtained by leasing the lots in the subdivision.* [Italics supplied.]

The method employed by the other witnesses was similarly described and as to Russell the court below stated (R. 460):

> He also valued the lands by considering their best use as a subdivision, and by capitalizing, at 4%, *the earnings which he said would be made therefrom.* [Italics supplied.]

Respondents' lengthy statement of the testimony (Br. 9–14) demonstrates the correctness of this description of the evidence.[5]

Nevertheless respondents state (Br. 24):

> The owners at no time contended that the value of the land was to be determined by

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[5] The fact that some of the witnesses purported to allocate the total income from the projected subdivision between the land and the other factors contributing to the total result by making some allowance for promoter's profit, interest on investment, "service charges" on improvements, etc. (Resp. Br. 11–12, 13, 46–47) increases, rather than diminishes, the conjectural nature of the process and does not justify admission of the evidence. See Govt.'s Br. 22–23; *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 419, 77 S. E. 565; *Laureldale Cemetery Co.* v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372; *Chatfield* v. *Board of Revision of Taxes*, 346 Pa. 159, 29 Atl. 685; *San Diego Land & Town Co.* v. *Neale*, 88 Cal. 50, 25 Pac. 977.

> estimated sales prices, or capitalized estimated rentals, to be obtained after subdivision, nor did they introduce evidence to that effect.

This assertion can only be justified by entirely disregarding the cross-examination showing the method employed by the witnesses in computing the figures they gave on direct examination. Thus, respondents' entire argument represents merely a statement in different terms of the erroneous contentions that the expert's definition of value is conclusive upon the courts (Gov'ts Br. 27–29) and that opinions of value may not be excluded when cross-examination shows that they were founded upon illegal considerations. (See *supra*, p. 1–5.)

For example, the brief discusses rental value at length (pp. 32–41) and contends that estimated rental value at the date of taking of the lands "in their then condition, but for a different use" was admissible (Br. 31). The argument is that the rental which was capitalized represented the amount for which the entire area of sugarcane lands might be rented to a promoter who would thereafter subdivide. (See Br. 25–26, 29, 30, 43, 50.) Perhaps such construction of the evidence would be possible from consideration of the direct examination alone. But the cross-examination made it perfectly clear that the witnesses were capitalizing the estimated rental from prospective

leases to home owners and truck farmers and not from a prospective lease to a promoter who would sublease after subdividing. Thus, on re-cross-examination, Castro admitted that he "just cut up these lots on this land and gave them a rental value and then arrived at the total figure" (R. 200). Harrison used two different rates of capitalization, "the residence lots of 4% and the area for small farm lands at 5%" (R. 210). The average rental of truck farms which he capitalized was determined by assigning a rental to each farm, adding them up to produce a total rental of the truck farm area, and then dividing by the acreage to produce an average rental per acre (R. 213). Kearns calculated his average rental in the same manner (R. 262). Finally Russell, who valued the entire area for house lots, went through the Trustee's plan for a subdivision and "put a rental value on each lot" (R. 344).

Thus, the question whether value might be based upon a capitalization of the estimated rental which might be obtained on a lease to a promoter who would thereafter subdivide is not here presented. It is difficult to understand why the witness should be permitted to capitalize the rental he estimates a promoter would pay for the entire tract rather than simply express his opinion as to the amount for which the promoter

would purchase the property.* Even assuming that such capitalization would be permissible, it does not justify the process here employed based upon the estimated rentals of lots after the subdivision has been completed. As the Government's opening brief pointed out (p. 15) there is a vast difference between the value of lots in the completed subdivision and the value of the sugar cane land potentially useful for subdivision purposes. The importance of this difference is manifest from the fact that although respondents' witnesses Castro, Harrison, and Kearns assigned residence value to only 10% of the land condemned (cf. Resp. Br. 8, 12, 24), the value of that small area represents half of their total valuation. (See Appendix A, B, *infra*, summarizing all the valuations and breaking down respondents' valuations.) The process of basing the opinions of present value upon the sales price or capitalized rental

* None of the cases cited by respondents (Br. 33, 52–53) sustains the admission, as evidence of the fee value of the land condemned, of valuations based on the capitalization of rents which witnesses estimate might be obtained if the land were put to some more profitable use. See Orgel, Valuation Under Eminent Domain (1936), sec. 184, p. 578. *Egan* v. *City of Philadelphia*, 108 Pa. Super. 271, 164 Atl. 813 (1933) involved condemnation of one year's use of the property; hence rental value was the question to be determined. *Idaho Farm Development Co.* v. *Brackett*, 36 Idaho 748, 213 Pac. 696 (1923), reversed the trial court for admitting evidence of the revenue ordinarily derived from cattle ranches in the vicinity of similar size to the ranch condemned. Most of the cases cited (Br. 33) presented exceptions to the general rule excluding business profits because the nature of the property

of residence lots after subdivision thus results in tremendous inflation of value, exceeding $8,000 per acre in some instances. (See Appendix B, *infra.*) Respondents' truck farm valuations were $130 to $140 less than the jury's award of $800 per acre; hence, the judgments can be supported only by

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valued prevented application of the usual methods of valuation, the courts frequently stating that the property had no market value. Such cases are the following: *Chicago, B. & Q. R. Co.* v. *North Kansas City Develop. Co.*, 134 F. 2d 143 (C. C. A. 8) certiorari denied, 319 U. S. 771 (condemnation by railroad of track and switch facilities); *Northern Pac. R. Co.* v. *North American Tel. Co.*, 230 Fed. 347 (C. C. A. 8), certiorari denied, 249 U. S. 607 (condemnation by telegraph company of right of way for poles over railroad right of way); *Lebanon & Nashville Turnpike Co.* v. *Creveling*, 159 Tenn. 147, 17 S. W. 2d 22 (1929) (condemnation of roadbed, right of way, easements and franchise of toll turnpike); *Sanitary District of Chicago* v. *Pittsburgh F. W. & C. R. Co.*, 216 Ill. 575, 75 N. E. 248 (1905) (condemnation of part of railway terminal in Chicago); *State* v. *Suffield & Thompsonville Bridge Co.*, 82 Conn. 460, 74 Atl. 775 (1909) (condemnation of toll bridge); *Assessors of Quincy* v. *Boston Con. Gas Co.*, 309 Mass. 60, 34 N. E. 2d 623 (1941) (tax valuation of mains, etc., of Gas Company). In *Somers* v. *Meriden*, 119 Conn. 5, 174 Atl. 184 (1934) both parties admitted that under the circumstances the property should be valued by capitalization of earnings.

The Hawaiian tax cases cited by respondents (Br. 52–53) likewise fail to support the argument. For the most part, the tax assessments are based on a different statutory standard of value than that applicable to condemnation proceedings and the property interests to be valued are different. See *Re Taxes Bishop Estate*, 27 Haw. 190, 192–193 (1923); *Re Taxes Bishop Estate*, 13 Haw. 671 (1901), discussing "eight-year rental" rule in assessing leased property. In any event, the cases did not involve rental from a different prospective use.

reliance upon this speculative theory of residence valuation.

Respondents' brief does not, therefore, suggest any reason nor cite any authority to justify the admission of the speculative opinions of their experts.

B. *Elements of value due to a landowner's monopoly of undeveloped land should be disregarded in awarding just compensation for the taking of a part thereof.*—To support inclusion of this element of value, respondents rely upon the erroneous notions that facts appearing on cross-examination must be disregarded in determining admissibility of opinions of value (Br. 59) and that the presentation of rebuttal evidence waives the objections (Br. 60). The assertion (Br. 59–60) that the Government's objection merely goes to the weight and not to the admissibility assumes that such monopoly value might properly be included in the award.

Respondents do not answer the Government's argument that such monopoly value represents special value to the owner rather than market value and cannot be considered. Respondents imply that this objection was not raised at the trial, stating that no motion was made to strike the testimony of the witnesses on this ground (Br. 59, 3). The motion to strike Harrison's testimony on the ground that it "assumes a false set of facts and conditions which does not reflect the true market value tested by the ordinary rule" (R. 228),

and to strike Kearns' testimony on the ground that it was "based on a false premise and is not a test of the market value of the property" (R. 262) plainly embraced the question whether monopoly values could be included in market value. And specific objection was made to the inclusion in Russell's valuation of "a contemplated use of the lands in question with lands of the same owner, it is not material and is not competent in proving market value" (R. 315). Nor did the court, as respondents state (Br. 61), give the instruction to the jury requested by the Government. The Government's requested charge excluded monoply value as follows, "you are not to assume that the trustees of the Damon Estate would not release any of the lands in the immediate vicinity from this present status" (R. 85). The charge given permitted such assumption, and hence permitted the jury to award monopoly value. (See Govt.'s Br. 32–33.)

C. *The judgments include enhancement of value resulting from the project for which the lands were taken.*—Respondents' argument is largely devoted to discussion of the fact that the United States did not raise this question until after this Court decided *United States* v. *Miller,* 317 U. S. 369 (Br. 61–62, 65–66). This defect is not jurisdictional and respondents suggest no reason to justify inclusion of such enhancement in the instant case. (See Govt.'s Br. 35–36.) Respondents' attempt to distinguish the *Miller*

decision on the ground that Pearl Harbor Navy Yard and Hickam Field have been in existence since 1901 and 1933 respectively (Br. 64–65, 6) plainly lacks merit. The Government is not objecting to enhancement which may have occurred when those military installations were first constructed. The objection is to enhancement arising from expansion of this military base as part of the national defense program. Respondents do not deny that the Government's activities did produce such enhancement. In fact they rely (Br. 28, see also Br. 14) on the fact that the Navy approached them in 1939 or 1940 concerning use of the lands for housing and that the lands were taken for housing purposes to support their contention that the best use of the lands was for subdivision purposes. Plainly, the principle of the *Miller* decision that "the owners ought not to gain by speculating on probable increase in value due to the Government's activities" is directly applicable.

The fact that 77 acres, which adjoin Hickam field, were taken for Army housing, while the remainder of the 331 acres was taken for Navy housing, does not justify payment of such enhancement (cf. Respondents' Br. 62). Both the Army air field and the Navy Yard were parts of the military base which has been greatly expanded. No reason can be given for limiting the *Miller* decision to cases where the activities of the particular department for whose use the land has

been condemned produces the enhancement. Such limitation would, in the instant case, deny enhancement of the 254 acres taken for the Navy, but would permit inclusion of this element in the award for the 77 acres taken for Army housing. Above all, respondents have shown no reason why they are entitled to recover for enhancement resulting from a prospective acceleration of the Government's needs four or five years after these suits were instituted in plain violation of this Court's pronouncements in the *Miller* case. Such is the obvious result of respondents' capitalization scheme, for Russell himself admitted that his valuation was based on the assumption that the demand was "going to accelerate very rapidly" in the years immediately following the present takings.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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JANUARY 1944.

(APPENDIX A)

Summary of Valuations

	Case No. 434	Case No. 436			Total all Lands
	77.286 acres	Lots C-3-A, C-3-B-1, and C-3-B-3-A 192.936 acres	Lot D—Gore Lot 61.512 acres	Total Case No. 436 254.448 acres	331.734 acres
Government Witnesses:					
Crozier & Fernandez	$33,498.00	$78,706.00	$25,283.00	$103,989.00	$137,487.00
	(R. 117, 134.)	(R. 126, 138.)	(R. 126, 138.)	(R. 126, 138.)	
	$433 per acre.	$407 per acre.	$411 per acre.	$408 per acre.	$414 per acre.
Respondents' Witnesses:					
Castro	$70,718.62	$227,572.50	$70,311.75	$298,884.25	$368,589.66.
	(R. 169.)	(R. 167.)	(R. 160.)		
	$1,031 per acre.	$1,179 per acre.	$1,280 per acre.	$1,206 per acre.	$1,165 per acre.
Harrison and Kearns	$63,772.35	$182,068.00	$63,440.33	$245,507.43	$309,279.78.
	(R. 309; 346-347.)	(R. 200, 343.)	(R. 206, 340.)		
	$825 per acre.	$943 per acre.	$1,031 per acre.	$964 per acre.	$932 per acre.
Russell	$170,279.17	$216,134.75	$127,931.25	$344,065.00	$514,344.17.
	(R. 335.)	(R. 321.)	(R. 330.)		
	$2,203 per acre.	$1,120 per acre.	$2,076 per acre.	$1,352 per acre.	$1,550 per acre.
Verdicts	$61,830.40			$238,574.40	$365,404.80.
	(R. 32.)			(R. 72.)	
	$800 per acre.			$800 per acre.	$800 per acre.
Deposits with Declarations of Taking	$33,498.00			$123,671.94	$157,269.94.
	$433 per acre.			(R. 59.)	
				$486 per acre. (Including improvements).	$474 per acre.

(24)

APPENDIX B

Break-down of Respondents' Valuations

	Castro				Harrison and Kearns				Russell
	Acres	Percent of total		Percent of total	Acres	Percent of total		Percent of total	
Case No. 424:									
Residence lots	4.5 (R. 190)	5	$20,565.00 (R. 191.) $4,548 per acre.	28	4.5	5	$20,250 [1] (R. 518.) $4,500 per acre.	62	
Truck Farms	72.7	94	$48,330.43 (R. 191.) $691 per acre.	61	72.7 (R. 280)	94	$34,172.90 $332 per acre.	32	
Total	77.2	100	$79,715.43 $1,033 per acre.	100	77.2	100	$63,772.55 $825 per acre.	100	$170,279.17. (R. 331.) $2,205 per acre.
Case No. 428:									
Lots C-9-A, C-3-B-1, and C-9-B-3-A:									
Residence lots	14.9 (R. 191)	7	$110,042.50 (R. 191.) $7,385 per acre.	46	14.9 (R. 306)	7	$63,972.36 $4,192 per acre.	33	
Truck Farms	177.9	92	$117,530.00 $660 per acre.	51	177.9 (R. 317)	93	$119,477.64 [2] $671.60 per acre.	66	
Total	192.9	100	$227,572.50 $1,179 per acre.	100	192.9	100	$183,050.00 $943 per acre.	100	$316,134.75. (R. 331.) $1,130 per acre.
Lot D:									
Residence Lots	16.2 (R. 188)	27	$51,177.18 (R. 189.) $3,158 per acre.	64	16.2 (R. 312)	27	$33,311.60 [3] $2,179 per acre.	33	
Truck Farms	45.3	73	$28,134.66 $671 per acre.	35	45.3	73	$28,133.32 $621 per acre.	44	
Total	61.5	100	$79,311.75 $1,289 per acre.	100	61.5	100	$61,449.32 $1,031 per acre.	100	$127,931.25. (R. 330.) $2,080 per acre.
Total:									
Residence Lots	31.1	12	$161,219.62 $5,183 per acre.	32	31.1	13	$101,234.90 $3,373 per acre.	41	
Truck Farms	223.2	87	$143,664.66 $662 per acre.	47	223.2	87	$142,088.68 $653 per acre.	58	
Total	254.4	100	$305,884.00 $1,205 per acre.	100	254.4	100	$243,307.22 $964 per acre.	100	$344,066.00. $1,352 per acre.
Total, All Lands:									
Residence Lots	35.6	10	$192,084.62 $5,396 per acre.	40	35.6	10	$141,434.30 $3,972 per acre.	45	
Truck Farms	256	89	$194,515.09 $664 per acre.	60	256	89	$167,895.96 $649 per acre.	54	
Total	331.6	100	$386,599.71 $1,165 per acre.	100	331.6	100	$309,279.48 $932 per acre.	100	$514,344.17. $1,550 per acre.

[1] The witness cut this area into 22 lots valued at $1,800 per lot (R. 218).
[2] The witness valued this area at the average per acre of $671.60 (R. 317).
[3] See respondents' brief 11.

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